Supreme Court, U.S.
FILED

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No. 99 1 3 6 MAY 1999

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1999

CHARLES MIDDLETON, SR.
MAJOR, USAF, RETIRED,

Petitioner,

(Pro Se)

v.

MADELINE K. ALBRIGHT,
SECRETARY, U.S. DEPARTMENT OF STATE,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

An individual filing a cause of action for disability discrimination against a public entity, in Petitioner's case a federal agency, cannot bring such an action under the Americans with Disabilities Act (ADA) of 1990 because the United States/Federal Government does not fall into the definition of "employer" as defined under the ADA. Thus, the only recourse is to file suit under the Rehabilitation Act of 1973 (U.S.C.S. 701 et seq). In addition, the Equal Employment Opportunity Commission (EEOC) does not administer the Rehabilitation Act as it does Title VII of the Civil Rights Act of 1964 and the ADA; except for Section 717 of Title VII which covers federal employment:

The questions presented in this case are:

1. Whether the district court was compelled to construe the stated cause of action, disability discrimination claim, under the Rehabilitation Act of 1973 (29 USCS 794).

2. Whether under the Rehabilitation Act the exhaustion of administrative remedy doctrine applies.

3. Whether under Title VII, section 717, exhaustion of administrative remedy doctrine applies when filing a claim against a federal agency.

QUESTIONS PRESENTED FOR REVIEW
– Continued

4. If this Court were to find, in the alternative, that the exhaustion doctrine is required under the Rehabilitation Act and section 717 of Title VII-which incorporates ADA, whether Petitioner's raising of the disability discrimination issue in the Agency's official investigation report was sufficient to meet the exhaustion standard in light of the fact that EEOC cited in its Notice of Right to Sue Letter both Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973 as the controlling legal authorities for filing cause of action in district court.

5. Whether failure of Petitioner to exhaust administrative remedies actually precluded the district court from exercising jurisdiction over claim of discrimination due to disabilities, and especially since Petitioner filed a mixed motive claim based on race and age and disability, coupled with a supplemental claim based on institutional animus.

6. Whether the disability discrimination claim was a probative issue since the Board of Examiner's Evaluation Panel

QUESTIONS PRESENTED FOR REVIEW
– Continued

had full knowledge of Petitioner's medical conditions, which could have influenced the Panel's employment selection decision.

II

During the April 2, 1998 hearing pertaining to Respondent's Renewed motion for Summary Judgment, the district court rejected the affirmative "poor writing skills" defense proffered by Respondent as the legitimate reason for terminating Petitioner from the Affirmative Action Mid-Level Foreign Service Officer Program. As a result, Petitioner clearly carried his burden of proof in rebutting that defense. However, the district court dismissed the case because Respondent demonstrated that a minority was hired in Petitioner's place; and, thus, failed to move the case to another level of specificity in order to provide fair opportunity to establish that there were reasons other than race, age and disability which could have motivated the employment decision. As a result, Petitioner was not afforded the opportunity to establish that stated reason was pretextual.

The trial court used the McDonnell Douglas hiring test model to analyze a case that involved the recruitment of women and minorities to eradicate the underrepresentation of those groups in the Foreign Service Corp. Petitioner, met all four basic elements that comprise the McDonnell Douglas model. Thus, the introduction of a fifth element into the model that asked whether a "non-minority" was or was not hired should have been considered irrelevant and inapplicable

QUESTIONS PRESENTED FOR REVIEW
– Continued

since the Program was Congressionally mandated to recruit women and minorities, exclusively. In addition, although Petitioner established a prima facie case, the trial court considered the issue of "poor writing skills" to be too trivial for a jury to consider; even though that was Respondent employer's stated reason for denying Petitioner's candidacy. As a result, at least one principal genuine issue of material fact remained.

Respondent also filed three additional exhibits as exculpatory evidence in which Petitioner was not provided fair opportunity to respond before the trial court issued its final summary judgment decision, despite Petitioner sending a direct request to the district court due to his lawyer having withdraw from the case on the exact same day of the hearing of April 2nd. Petitioner's attorney apparently had obtained special permission from the federal agency for which he had been employed for approximately two months before Petitioner was informed of this conflict on April 7th by telephone. Also, Petitioner's supplemental complaint was not addressed by the court. As a consequence, Petitioner was denied due process of law in reference to arguing the merits of his supplemental complaint and counter-arguing the pleadings attributed to the additional three exhibits.

1. Whether the district court's dismissal of Petitoner's case met the standards for issuance of a summary judgment as established by this Court, in that "all the facts should be viewed in the light most favorable to the nonmoving

QUESTIONS PRESENTED FOR REVIEW
– Continued

party, and give him the benefit of all reasonable inferences that can be drawn from the facts."

2. Whether the district court's discretionary decision not to consider Petitioner's supplemental complaint and not to allow Petitioner a fair opportunity to respond to the three additional exhibits filed just prior to start of April 2nd summary judgment hearing, constituted a denial of due process of law.

3. Whether after establishing a prima facie case by refuting Respondent's stated reason for its employment decision, the issue of "poor writing skills" should have been left to a trier of fact to determine liability on part of employer.

4. Whether after showing that a severe underrepresentation of Petitioner's protected group exists in employer's general work force and its Foreign Service Corp in particular, as defined under Civil Service Reform Act of 1978, should that evidence alone have been sufficient to establish a prima

QUESTIONS PRESENTED FOR REVIEW
– Continued

facie case, and genuine issue that was probative.

5. Whether the trial court should have suspended April 2, 1998 summary judgment hearing upon learning that Petitioner's lawyer had obtained a position with the United States Government, which is the very same public entity that Petitoner is suing and that the lawyer was litigating against as Petitioner's advocate.

6. Whether the district court should have allowed Respondent to use the business necessity defense in an "intentional" discrimination case, as prohibited by the Civil Rights Act of 1991.

7. Whether after learning that Respondent employer had refused to adopt a less-discriminatory employment practice, that being the Uniform Guidelines on Employee Selection Procedures, did the trial court err by not considering that refusal as an admission of culpability and probative evidence.

QUESTIONS PRESENTED FOR REVIEW
– Continued

8. Since the objective of the Mid-Level Program is/was to exclusively recruit individuals from Title VII protected groups, should not the trial court have (1) tailored the McDonnell Douglas employment hiring test model to fit the specific case at hand; (2) ruled that the "non-minority" issue was "moot" in light of the fact that the court accepted, although with suspicion, Respondent's altered and inconsistent explanation that non-minorities were not hired in 1992 when Petitioner applied for the Program; and, (3) not have allowed that fifth element to be used as the determining factor for issuing a summary judgment ruling in favor of Respondent.

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to be addressed by the Supreme Court, and in so doing has created an additional obstacle and unnecessary barrier that is contrary to the purpose, intent, and spirit of the Rehabilitation Act of 1973, Civil Rights Act of 1964, the Veterans' Preference act of 1944, the ADA of 1990, and Title 22, §3941(c), et al. 13

II District of Columbia Circuit has affirmed a district court's decision on an important federal question in a way that conflicts with relevant decisions of this court in which the shifting of burden standard was laid to rest, and in so doing has lowered and undermined the standard for granting summary judgment, and added conflicting confusion to the issue of standard of liability and burden of proof that a plaintiff must meet to prevail after establishing a prima facie case and leaving to a trier of fact to sort out the truth. 21

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Charles Middleton, Sr, respectfully, requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia.

OPINIONS BELOW

The October 28, 1998 Order of the United States Court of Appeals for the District of Columbia, affirming the decision of the United States District Court for the District of Columbia, which granted a summary affirmance judgment in favor of Respondent, is printed here at Appendix A. The district court's October 24, 1997 Order and April 27, 1998 Order with Memorandum are printed here as Appendix B. The D.C. Circuit's February 22, 1999 Order denying petition for Rehearing En Banc is printed here as Appendix C, and the Equal Employment Opportunity Commission's Notice of Right To Sue Letter is provided here as Appendix D.

STATEMENT OF JURISDICTION

This petition for a Writ of Certiorari seeks review of the Order of the United States Court of Appeals for the District of Columbia Circuit entered on October 28, 1998. Petitioner's timely filed petition for rehearing en banc was denied by the D.C. Circuit of Appeals on February 22, 1998. App. C.

Jurisdiction is invoked pursuant to 28 U.S.C. 1254. This petition for Certiorari is timely filed pursuant to 28 U.S.C. 2101(c).

STATUTES INVOLVED

The statutes applicable to this case are as follows:

Rehabilitation Act of 1973-Employment of Individuals with Disabilities

General Rule:

Federal agencies; affirmative action program plans. Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch [shall], within one hundred and eighty days after the date of enactment of this Act [enacted Sept. 26, 1973], submit to the Commission (Interagency Committee on Employment of Individuals with Disabilities) an affirmative action program for the hiring, placement, and advancement of individuals with disabilities in such department agency, or instrumentality. Such plan [shall] include a description of the extent to which, and methods whereby, the special needs of employees who are individuals with disabilities are being met. Such plan [shall] be updated annually, and [shall] be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.

Title 5, Section 2108, Chapter 21-Definitions

Veteran; disabled veteran; preference eligible:

(1) The term "veteran" means with respect to an individual who —

(A) served on active duty in the armed forces during war, in a campaign or expedition for which a campaign badge has been authorized, or during the period beginning April 28, 1952, and ending July 1, 1955; or

(B) served on active duty as defined by 101(21) of title 38 at any time in the armed forces for a period of more than 180 consecutive days any part of which occurred after January 31, 1955, ..., and who has been separated from the armed forces under "honorable" conditions.

(2) "disabled veteran" means an individual who —

(A) has served on active duty in the armed forces,

(B) has been separated therefrom under "honorable" conditions,

(C) has established the present existence of service-connected disability, or

(D) is receiving compensation, disability retirement benefits, or pension because of a public statute administered by the Department of Veterans Affairs or a military department.

(3) "preference eligible" means ----

(A) a veteran as defined by paragraph (1)(A) above;

(B) a veteran as defined by paragraph (1)(B) above;

(C) a disabled veteran;

(D) the unmarried widow or widower of a veteran as defined by paragraph (1)(A) above;

(E) the wife or husband of a service-connected disabled veteran if the veteran has been unable to qualify for any appointment in the civil service or in the government of the District of Columbia; and .....

Title 22, Section 3941(c), Chapter 52-Foreign Service

General Provisions-Veteran or disabled veteran:

The fact that an applicant for appointment as a Foreign Service officer candidate is a "veteran or disabled veteran" [shall] be considered an affirmative factor in making such appointments. As used in this subsection, the term "veteran or disabled veteran" means an individual who is preference eligible under subparagraph (A), (B), or (C) of Title 5.

Americans with Disabilities Act of 1990

General Rule:

No covered entity [shall] discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures the hiring, advancement, or discharge of employees, employee compensation, job training, and/or other terms, conditions, and privileges of employment. 42 U.S.C. 12112(a)

Disability:

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such

individual;

(B) a record of such an impairment; or

(C) being regarded as having an impairment. 42 U.S.C. 12102(2)

Qualified individual with a disability

The term "qualified persons with disability means an individual with a disability who, [with or without] reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. 12111(8).

STATEMENT OF THE CASE

A. Basis for Federal District Court Jurisdiction-Proceedings Below

Petitioner, Charles Middleton, Sr. an Afro-American male, retired United States Air Force officer and preference eligible veteran with 20% service-connected disability rating from the Department of Veterans' Affairs (VA), applied in June 1992 to the Department of State (DOS), or the Agency, for consideration as a candidate for the Affirmative Action Mid-Level Foreign Service Officer Program that was Congressionally mandated to eradicate the "severe underrepresentation" of women and minorities in the Foreign Service Corp. [1]

---

[1]The term "severe underrepresentation" was defined by the Civil Service Reform Act of 1978 to describe situations in which a Title VII protected group's representation in an agency is less than 50 percent of the civilian labor force rate.

Middleton's application package went before a three member Board of Examiner's (BEX) Panel that operated under a subjective "Pass-Fail" testing system that had not been validated, and for which panelists were not using objective, or nondiscretionary uniform guidelines in performing evaluations. The Panel rated Middleton with a "failing" grade, with stated reason being because of "poor writing skills." This unfavorable grade eliminated Middleton from continuing on to the second phase of the selection process.

Middleton challenged DOS' stated reasons as pretext for "masking" actual motives, and, submitted an initial discrimination complaint thorough Respondent's respective Equal Employment Opportunity Office (EEOCR) for resolution.

Middleton theorized in response to the official investigation report that the real reasons could have been due to his race, age, gender, or, in the alternative, because of his service-connected disability rating from the VA that classified him as a 10-point compensable veteran, but with less than a 30% disability at the time of application.

After the Agency investigation report was completed and more than 270 days had expired without resolution, Middleton requested transfer of his entire case file to the Equal Employment Opportunity Commission (EEOC) for adjudication. Respondent's EEOCR complied with Petitioner's request.

On December 14, 1995 EEOC issued a "Notice of Right to Sue" Letter, citing Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000(e) et seq. and the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791, 794(c). App. D.

On April 19, 1996, Middleton filed, as attorney pro se, a mixed-motive suit against "DOS" claiming intentional discrimination based on race, age and disability under Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act of 1967 (ADEA), the Veterans' Preference Act (VPA) of 1944 and the Americans with Disabilities Act (ADA) of 1990, respectively. The case was initially filed in the United States District Court for the Northern District of Illinois, Eastern Division, and was subsequently transferred to the United States District Court for the District of Columbia, on a mutually agreed basis.

In July 1996, after acquiring new information, Middleton filed a supplemental complaint alleging possible rejection of his candidacy due to institutionalized animus because he had listed as a reference on his application a Mr. Odie N. Fields, a former employee of DOS who had served as a career foreign service officer and who had been discharged on an involuntary basis. The supplemental complaint was filed to establish that there could have been alternative motives for petitioner's nonselection besides race, age and disability, as initially alleged.

Jurisdiction pertaining to the original and supplemental complaints was proper and timely for both the United States District Court for the Northern District of Illinois, and the District of Columbia pursuant to 28 U.S.C. 1233(1) et seq., 29 U.S.C. 791 and 794(c), 29 USCA 701, and Title VII, Subsection 2000e, 16(f)(3).

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

1. Dismissal of Disability Discrimination Claim

As a VA classified disabled veteran with service-connected compensable disabilities, Middleton chose the option of invoking his employment preference rights by providing a completed Standard Form (SF) 15, Application for 10-Point Veteran Preference benefit at time of employment application submission. Accompanying the SF 15 was a copy of the official letter from the VA, dated October 3, 1990, consisting of detailed and comprehensive information pertaining to Middleton's 20% disability rating from the VA listing all his medical conditions that were established as being service-connected, non-correctable, and compensable; coupled with other disabling conditions for which compensation was not payable.

Middleton's veteran's preference standing and disability status were also provided in the preparation of SF 171-Application for Federal Employment, Form 79-2-Background Survey Questionnaire, and SF 256-Identification of Handicap Status. On SF 256, petitioner placed Code 05 in the appropriate box in correlation with a pre-worded declaration stating: I do not have a handicap; thus, indicating that as a "qualified individual with a disability" who, with or without reasonable accommodations, could perform the essential functions of the employment position that was desired, pursuant to 42 U.S.C.S. 12111(8).

In answer to Interrogatory No. 6 of Respondent's official investigative report, which asked "to please explain in detail the basis for your allegation that your nonselection for a position as a Mid-Level Foreign Service Officer was based on race and age," Petitioner responded by stating that "I believe the age factor could have entered into the evaluators' decision not to continue my candidacy because of Mr. Kaufman's (a DOS personnel specialist) [prejudicial] statement to me during our September 15, 1992 telephone conversation that "it was felt I would be [too slow] in meeting

pressured deadlines."

Petitioner continued by stating: "although I did not mention this earlier in my complaint, Mr. Kaufman's comment could have possibly been attributed to my being classified as a Vietnam Era veteran with 20% disability at time of application submission"; thus, inferring there was a strong possibility that the disability conditions could have been an influencing factor in Respondent's employment decision to terminate his candidacy.

During summary judgment hearing for dismissal of disability discrimination claim on October 22, 1997, the district court held that exhaustion of administrative remedies was required when filing a discrimination disability claim under ADA against a federal agency, and that Middleton had failed to sufficiently notify EEOC of such a charge during the administrative process. As a result, Middleton's disability discrimination charge against respondent was dismissed for lack of jurisdiction and failure to exhaust administrative remedies. App. B.

2. Denial of Due Process of Law and Fair Opportunity to Show Pretext Pursuant to the McDonnell Douglas Hiring Test Model and Withdrawal of Counsel.

After dismissal of the disability discrimination part of Middleton's mixed-motive claim, the cause of action against Respondent alleging intentional discrimination and disparate impact due to race and age was allowed to proceed.

As a consequence, the central focus in the case shifted to establishing intentional discrimination based on race, with a disparate impact on petitioner's protected group, and/or, in the alternative, making a persuasive and convincing showing

that there were pretextual motives besides the issue of race that influenced the employment decision. Thus, in the event Middleton did not prevail in establishing a prima facie case based on the theory of racial discrimination, he would be able to offer additional evidence to show that there were pretextual motives when afforded the opportunity to argue the merits of his supplemental complaint.

During latter part of 1997, Middleton obtained the services of Harmon and Wilmont, L.L.P., a Washington, D.C. law firm to represent him in his pending civil suit. Mr. Robert F. Condon was assigned as lead attorney. On April 2, 1998 there was a hearing in the district court pertaining to Respondent's Renewed Motion for Summary Judgment. On April 7th, Middleton received a conference call at his residence in Chicago, IL from attorneys Condon and Harmon to inform him that the summary judgment hearing had taken place, and that it appeared the court was going to rule in favor of Respondent.

Middleton was also informed for the first time that Mr. Condon had withdrawn from the case because he had started working for the Federal Government, the Merit Systems Protection Board, approximately two months prior, and, as a result, he had obtained special permission to appear before the district court for the April 2nd hearing. Mr. Condon stated that the trial judge had been informed as well that he was withdrawing from the case, and the district court judge would "suspend all actions" until a new attorney takes over the case. Mr. Condon further stated the trial judge would hold a "status hearing" once the new attorney comes on board. Apparently this understanding was reached during an ex parte meeting because the subject is not mentioned in the official transcript.

Mr. Harmon stated that he had forgotten to inform

Middleton when he was first told two months prior that attorney Condon would be withdrawing from the case, that several lawyers had already been contacted, and a couple of them had shown interest in taking the case if an appeal were to be eminent. Middleton emphasized that he would definitely be filing an appeal if the trial court ruled against him.

Mr. Condon stated that Respondent had filed three additional exhibits as supporting evidence and the copies provided to him would be mailed to Middleton. Mr. Condon did not mention whether (1) he had objected to the untimely filing of new evidence; (2) whether postponement of hearing was requested to review the exhibits by Petitoner or new counsel; or, (3) whether the trial court was urged to at least delay a final ruling until a determination was made as to whether a rebuttal response was warranted.

In addition, Mr. Condon apparently did not remind the trial judge about the supplemental complaint that was still pending before the court because review of the transcript reveals that neither Mr. Condon nor the trial court raised the supplemental complaint issue.

Upon receiving copies of the three exhibits, one copy from Mr. Condon and another copy from Respondent's attorney, Middleton sent a facsimile to the district court judge on April 15, 1998 to inform him there would be a rebuttal response to the additional three exhibits that were filed on April 2nd, and that Middleton would have to represent himself again, until another attorney was obtained to replace Mr. Condon. There was no forthcoming response on the part of the trial judge indicating that time would be allowed for filing a reciprocal response. Further, Middleton did not receive any documents from his attorney or from the court showing that withdrawal from the case was reviewed and

approved by the court IAW D.C. Ct. R. 104(h), and 201(c).

As a result, Middleton was denied a fair and equitable opportunity to file a reciprocal response to further establish a prima facie case through the introduction of new evidence as rebuttal and to argue the merits of his supplemental complaint to show that Respondent's stated reasons were pretextual. As a consequence, Middleton was clearly denied due process of law procedure, and since he was never contacted by Mr. Harmon concerning a replacement attorney, he was placed at a significant disadvantage of having to represent himself as pro se attorney and because of the distance between Chicago and Washington, D.C.

During the April 2, 1998 hearing, the district court clearly rejected Respondent's proffered "poor writing skills" defense as a legitimate reason for not selecting Middleton into the Program, but, ruled that this was not material, and, therefore, granted summary judgment because Respondent had satisfied the "added" fifth prong element of the McDonnell Douglas hiring test model that requires a showing on part of Respondent that "a non-minority was not hired in Middleton's place. In addition, the trial court ignored the disparate impact theory, rejecting the comparative statistical data presented as evidence, and improperly applying the McDonnell Douglas hiring test formula to analyze whether intentional discrimination had occurred, or whether there were pretextual motives.

On April 27, 1998, the trial court filed its summary judgment decision in favor of Respondent in spite of the fact, according to Mr. Condon, there would be a suspension of all actions until Middleton obtained a new attorney and the April 15th facsimile stating that a rebuttal response to Respondent's filing on April 2nd would be forthcoming.

On October 28, the D.C. Circuit's Appellate Panel issued an order affirming the district court's summary judgment through a summary affirmance decision in favor of Respondent. Middleton's request for a rehearing en banc was denied and filed on February 22, 1999.

REASONS FOR GRANTING THE WRIT

I THE D.C. CIRCUIT HAS ISSUED A DECISION ON AN IMPORTANT FEDERAL ISSUE PERTAINING TO A DISABLED VETERAN'S PRIVATE RIGHT OF ACTION WHICH HAS YET TO BE ADDRESSED BY THE SUPREME COURT, AND IN SO DOING HAS CREATED AN ADDITIONAL OBSTACLE AND UNNECESSARY BARRIER THAT IS CONTRARY TO THE PURPOSE, INTENT, AND SPIRIT OF THE REHABILITATION ACT of 1973, CIVIL RIGHTS ACT OF 1964, THE VETERANS' PREFERENCE ACT OF 1944, THE ADA OF 1990, AND TITLE 22, SECTION 3941(C), et al.

Enacting the Rehabilitation Act of 1973, Congress found that:

> [M]illions of Americans have one or more physical or mental disabilities and the number of Americans with such disabilities are increasing, constitute one of the most disadvantaged groups in society, and that disability is a natural part of the human experience and in no way diminishes the right of individuals to live independently, enjoy self-determination, make choices, contribute to society, pursue meaningful careers, and

> enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society.[2]

29 U.S.C.A. 701 *et seq.*

> Congress stated that:
>
> [I]ndividuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodation, education, transportation, communication, institutionalization, recreation, health services, voting, and public services; and the goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to (1) make informed choices, and (2) achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency, for such individuals.

Id.

---

[2]According to the Department of Veterans' Affairs, there are: (1) 25,000,000 veterans still living; (2) of that total number, 2,277,000 are classified with service-connected disabilities; and (3)1,091,000 veterans now work in the civilian labor force. Further, the Department of Labor reports indicate there are 52,000,000 nonveteran disabled persons. When the two populations of nonveterans and veterans are combined, a grand total of 54,277,000 disabled persons with non-correctable disabilities are covered under the ADA of 1990 and the Rehabilitation Act of 1973, et al.

Further, Congress declared that:

> [T]he purposes of this chapter (29 U.S.C.A. 701 et seq) are (1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, and (2) to ensure the Federal Government plays a "leadership" role in promoting the employment of individuals with disabilities, especially individuals with significant disabilities.....

Id.

Congress concluded:

> [I]t is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter (29 U.S.C.A. 701 et seq.) shall be carried out in a manner consistent with the principles of (1) respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice; (2) respect for the privacy, rights, and equal access; (3) inclusion, integration, and full participation of the individuals; (4) support for the involvement of an individual's representative if an individual with a disability requests, desires, or needs such support; and, (5) support for individual and systemic advocacy and community involvement.

Id.

Middleton filed his disability discrimination complaint mistakenly citing the ADA as the controlling legal authority. Where Middleton brought pro se action against DOS alleging

that he had been denied selection on basis of his disability in violation of ADA (42 USCS 12101 et seq.), the district court was "compelled" to construe the stated cause of action under the Rehabilitation Act (29 USCS 794) because "suit against an officer of a federal agency in an official capacity constitutes suit against the United States which is not permitted under ADA, and because Middleton was acting pro se." *Kemer v. Johnson* 900 F.Supp 677, 13 ADD 379, 4 AD Case 1823 (2nd Cir. 1995); *affd* without op. (2nd Cir. 1996), 101 F3d 683; reported in full (2nd Cir. 1996) U.S. App LEXIS 11511, *cert denied* (1996, U.S.) 136 L Ed 2d 338, 117 S CT 441.

EEOC's Title VII of the Civil Rights Act of 1964, incorporates ADA procedures and rather than issue a separate set of regulations for ADA, EEOC simply adopted existing rules. In so doing, the EEOC has administration and enforcement responsibility of Title VII and ADA (excluding Section 2000e [717]-Employment by Federal Government). EEOC does not have administration and enforcement over the Rehabilitation Act. EEOC: Title VII and ADA Procedural Regulations, Part 1601, Section 1601.1-Purpose; and Section 1601.18.

Section 1601.18 specifically states that a charge which raises a claim [exclusively] under Section 717 of Title VII and the Rehabilitation Act [shall not] be taken (by EEOC) and person seeking such claims shall be referred to the appropriate Federal agency. (As amended at 56 FR 9624, eff. April 8, 1991).

Congress intended that Rehabilitation Act (29 USCS 701 et seq) be the [exclusive] remedy for handicapped and disability discrimination by Federal employer. *Connolly v. United States Postal Service*, 579 F Supp 305, (1st Cir. 1984); and, *Harrison v. Marsh* 691 F. Supp.1223 (8th Cir. 1988).

The Ninth Circuit, correctly stated that:

> "Cannons of statutory construction dictate that if language of a statute is clear, we look no further than that language in determining the statute's meaning." *United States v. Lewis*, 67 F.3d 225, 228 (9th Circuit, 1995) (*citing Sullivan v. Stroop*, 496 U.S. 476, 478, 482 (1990)).

and

> If statutory language is ambiguous, courts must look into legislative history. *Id.* at 229.

Despite the clear, unambiguous and explicit language contained in Title VII pertaining to the procedure for filing a claim against a federal agency under ADA (Title VII, Section 717) or the Rehabilitation Act, coupled with the clear intent of the Congress to establish a check and balance mechanism, there are still some federal courts which continue to rule that Rehabilitation Act and ADA plaintiffs are required to comply with the exhaustion doctrine when filing a claim against a federal agency, while others have not.

The Third Circuit has held that a plaintiff "must" exhaust Title VII administrative remedies before bringing suit under section of the Rehabilitation Act pertaining to nondiscrimination under federal grants and programs, just as a person must before suing under section of the Act pertaining to employment of handicapped individuals by federal agencies. *Spence v. Straw*, 54 F.3d 196, 146 A.L.R Fed 675 (3rd Cir. 1995); *J.L. v. Social Sec. Admin.*, 971F.2d 260 (9th Cir. 1992).

The Tenth Circuit ruled that an Air force employee

was barred from raising handicap discrimination claim in district court for failure to exhaust administrative remedies. *Johnson v. Orr*, 747 F.2d 1352 (10th Cir. 1984). And last, the Ninth Circuit ruled that when constructing Title VII with the Rehabilitation Act that the latter does not provide basis for federal courts to assert jurisdiction over claims that had not been administratively exhausted. *Vinieratos v. U.S., Dept of Air Force Through Aldridge*, (9th Cir. 1991).

On the other hand, when interpreting the interrelationship between ADA and the Rehabilitation Act, and joining those two Acts with the provisions of Title VII, some courts have ruled more definitively that since (all) provisions of the ADA are to be interpreted consistently with Rehabilitation Act of 1973, and since section 504 of the latter defines the Federal Government as a "public entity" that is covered by Rehabilitation Act, plaintiffs are not required to exhaust administrative remedies before bringing federal suit against a federal agency, particularly since exhaustion is not required under Rehabilitation Act (29 USCS 701 et seq.) in such case, and ADA was meant to follow Rehabilitation Act and not apply lesser standard. *Grubbs v. Medical Facilities of Am.*, 7 ADD 570 (4th Cir. 1994).

More comprehensively, the Seventh Circuit has held that the Rehabilitation Act (42 U.S.C.S. 701 et seq.) provides handicapped persons with affirmative rights, creates private right of action, and does not require exhaustion of administrative remedies. *Adashunas v. Negley* 626 F.2d 600 626 F.2d 600 (7th Cir. 1980).

Additionally, the Eleventh Circuit stated that a handicapped city employee was not required to exhaust administrative remedies before suit under Rehabilitation Act of 1973; "exhaustion requirement applied only to federal government employees." *Ali v. City of Clearwater, M.D. Fla.*

807 F.Supp. 701 (11th Cir. 1992).

In reference to the issue of clarity, in two similar cases facing the Third and Fourth Circuits, both contended that there does exist ambiguity among the statutes and regulations, and ADA, pertaining to the issue of exhaustion of administrative remedies.

State university employee did not have to exhaust administrative remedies before bringing claim of employment discrimination under Americans with Disabilities Act (ADA) in private cause in federal court, in light of ambiguity on exhaustion question issue in Act's provisions governing public entities, in light of "Department of Justice" regulations which did not require exhaustion. *Unemployment Compensation Bd. v. Kessler*, 27 cm. with.1 365A.2d 459, 462 (3rd Cir. 1976); *Henry v. Deen*, 310, 75, 310 S. E.2d 326, 335 (4th Cir. 1984).

In Middleton's case, the trial court stated that its decision to dismiss the disability discrimination claim was also based on lack of subject matter jurisdiction. App. B. The district court's ruling clearly contradicts Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e): "Each United States district court and each United States court of a place subject to the jurisdiction of the United States [shall] have jurisdiction of actions brought under this subchapter." Section 2000e-16(F)(3).

Accordingly, the Fourth and Tenth Circuits, have consistently held that plaintiffs' failure to exhaust administrative remedies did not prevent district court from exercising jurisdiction over plaintiffs' cause of action under Americans with Disabilities Act (ADA). *Tyler v. City of Manhattan*, 857 Supp. 800 (10th Cir. 1994). And that state and federal courts have concurrent jurisdiction to entertain

claims under Rehabilitation Act..... *Spaulding v. Mingo County Bd. of Educ.*, 897 F.Supp. 284 (4th Cir. 1995).

The D.C. Circuit's own rule states that:

> "Because jurisdictional matters go to the very authority of the court, and consequently cannot be waived, jurisdictional issues may be raised on appeal "regardless of whether" they were raised in the trial court. D.C. App. R. 5.61.12."

Rightfully, Middleton challenged on appeal the trial court's decision dismissing his disability discrimination claim on the issue of lack of jurisdiction.

Irrespective of the D. C. Circuit ignoring its own rule, a conflicting affirmance of summary judgment decision still resulted, even after being apprised that the district court granted a summary judgment ruling in favor of Respondent employer, knowing that: (1) EEOC was aware that Middleton is a "qualified individual" with a disability; (2) pertinent and detailed information pertaining to his disability status and compensable and noncompensable and non-correctable medical conditions from the VA were a vital part of the Agency's investigation report that was transferred to EEOC; (3) all those factors were available for consideration and to weigh during EEOC's review and deliberative process upon rendering decision to issue a notice of right to sue; and, (4) that in its notice of right to sue, EEOC referenced Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. 2000(e) and the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791, 794(c), as the legal authorities for filing a cause of action in district court. Appendix A.

As a consequence, the D. C. Circuit's ruling

incorrectly left the implication that ADA incorporates all the procedures of Title VII cases, which completely ignores the clear fact that Middleton could not bring suit against a federal agency under ADA (Section 2000e 717). *Bercovitché v. Baldwin School*, 964 F.Supp. 597 605 (D.P.R. 1997); *see also Doukas v. Metropolitan Life Ins. Co.*, WL 833134 (1997).

Middleton successfully carried his burden of proof in rebutting respondent's proffered affirmative "poor writing skills" defense during the April 2, 1998 Renewed Summary Judgment hearing when the [entire] cause of action was dismissed, unquestionably. The trial court's decision to dismiss the disability discrimination claim was premature and should have precluded summary judgment.

As a result, since the trial court rejected Respondent's proffered reason, which constituted a falsity, a genuine issue of material fact existed as to whether respondent was in fact motivated [solely] because of service-connected disabilities, or a combination of discriminatory reasons that went unargued. *Carlin v. Trustees of Boston University*, 970 F.Supp. 509. (1st Cir. 1995). *See also Aka v. Washington Hospital Center*, No. 96-7089, (D.C. Cir. 1998).

II DISTRICT OF COLUMBIA CIRCUIT HAS AFFIRMED A DISTRICT COURT'S DECISION ON AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT IN WHICH THE SHIFTING OF BURDEN ISSUE IN EMPLOYMENT DISCRIMINATION CASES WAS LAID TO REST , AND IN SO DOING HAS LOWERED AND UNDERMINED THE STANDARD FOR GRANTING SUMMARY JUDGMENT, AND ADDED CONFLICTING CONFUSION TO THE ISSUE OF STANDARD

OF LIABILITY AND BURDEN OF PROOF THAT A PLAINTIFF MUST MEET TO PREVAIL IN ESTABLISHING A PRIMA FACIE CASE AND LEAVING TO A TRIER OF FACT TO SORT OUT THE TRUTH.

The standard for granting summary judgment is well established. Rule 56 of the Federal Rules of Civil Procedure states in pertinent part:

> (C)-Motions and Procedures Thereon....
>
> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is [no] genuine issue as to [any] material fact and that the moving party is entitled to judgment as a matter of law.

The Fifth Amendment states, in excerpted part:

> No person shall be deprived of life, liberty, or property, without due process of law.

Middleton clearly, met his burden of proof in establishing a prima facie case, by showing under the McDonnell Douglas prima facie hiring test standard that: (1) he was a member of Title VII-protected group; (2) he applied and was qualified for a position for which the employer was seeking applicants ; (3) despite his qualifications, he was rejected; and, (4) after his rejection, the position remained open and the employer continued to seek applicants from persons with Middleton's qualifications, including race and gender. Some courts have added a fifth element which requires a plaintiff to show whether " plaintiff was replaced

by a [nonminority] member." *McDonnell Douglas Corp. v. Green*, 411, at 802 (U. S. 1973).

The McDonnell Douglas prima facie hiring test model pertains, principally, to a case involving wrongful discharge. An obvious prejudicial conflict occurred when the district court allowed the fifth element to become the central focus for determining whether summary judgment was warranted.

Middleton's case deals with an applicant applying for a position with a federal employer that employs a discriminatory employment practice that involves use of a highly subjective testing and selection criteria, in administering a program that was Congressionally mandated "exclusively" for the recruitment of women and minorities to eradicate underrepresentation in Respondent employer's Foreign Service Corp., *Watson v. Fort Worth Bank & Trust*, 487, 977 (U.S. 1988).

Since the specific facts falling within each of the elements will vary, depending on the circumstances of the plaintiff's case, the district court failed to develop a "case specific" version of the McDonnell Douglas model to accurately fit and satisfy the uniqueness of the case involved. Thus, the fifth element was in actuality a "moot" issue that translated into being an unfair and irrelevant standard that was impossible for Middleton to meet, and, for which a bias and decisive advantage was provided to Respondent employer in spite of Middleton having carried the burden of establishing a prima facie case. Thus, as a consequence of carrying his burden, the standard for moving to another level of specificity to show pretextual motives should have automatically been triggered.

The Teamster' Court further elucidated the nature of the prima facie case explaining that:

> [T]he McDonnell Douglas formula does not require direct proof of discrimination, [but] it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons an employer might rely to reject a job applicant: (1) an absolute or relative lack of qualifications, or (2) the absence of a vacancy in the job sought. Elimination of these reasons for refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one. *International Brother Hood of Teamsters v. United States*, 431 at 358 n. 44., (U. S. 1977).

Without question, Middleton carried his burden in meeting those two most common and crucial aspects of the McDonnell Douglas prima facie hiring test model. After Respondent's failure to persuade the court that proffered reasons for denying Middleton employment were legitimate, it was then incumbent on the trial court to provide ample opportunity for Petitioner to show pretext either by "persuading the court that a discriminatory reason more likely motivated the employer or.. by showing that the employer's proffered explanation was unworthy of credence." *Id.* (citing *Burdine*, 450 U. S. at 256 (1981)).

This Court has long held on a consistent basis that a court considering a motion for summary judgment must view all facts in the light most favorable to the nonmoving party, and give the benefit of all reasonable inferences that can be drawn from the facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold*, Inc. 369 U.S. 654, 655 (1962)).

In Anderson, 477 U.S. at 249 and Matsushita, 475

U.S. at 586-87, this Court further established that "a summary judgment motion should be interpreted by the trial court to accomplish its purpose of disposing of factually unsupported claims, and the trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." See also *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990). The trial court, therefore, must "assess the adequacy of the nonmovant's response and whether that showing, on admissible evidence, would be sufficient to carry the burden of proof at trial." *Hartnagel v. Mormam*, 953 F.2d. 394, 396 (8th Cir. 1992) (citing *Celotex*, 477 U.S. at 322).

Fundamentally, a genuine issue of material fact existed when the "poor writing skills" defense was rejected by the district court. However, the district court made a discretionary decision that the "primary" stated reason given for Middleton's nonselection was "too trivial" of an issue for a jury to decide. Appendix B.

Further, Middleton filed a mixed motive case in which it was shown that some discriminatory intent was evident. After establishing such, he did not need to show that the racial discrimination (nor any other discriminatory basis or intent) was the sole reason for the rejection, but only that it could have been a motivating factor. *Bibbs v. Block*, U.S. 749 F.2d 508 (8th Cir. 1984).

Respondent employer alleged a legitimate "business" reason for its employment decision. However, in context of an intentional discrimination case, the business necessity defense was [unavailable] to Respondent employer for use, and as a consequence, should have been promptly eliminated and not allowed as a legitimate defense pleading, pursuant to the 1991 Civil Rights Act, Subsection 105(a)(2).

This Court, laid to rest these differences in *Price Waterhouse v. Hopkins* in which it was determined that in a mixed-motive case the burden of persuasion would shift to the defendant employer once the plaintiff had established that defendant's discriminatory practices were motivating factors in its employment decision *Price Waterhouse v. Hopkins*, 825 F.2d 458, 470, 44 FEP 825 9CADC (U. S. 1987).

Then, after the burden shifts, this Court asserted, the employer is required to establish by a preponderance of the evidence that "even if it had not taken [race, gender, national origin] into account it would have come to the same decision regarding that particular person. Respondent employer, unequivocally, failed to meet that test. *Id.*

In rebutting the employer's reasons, there are several factors upon which a plaintiff may rely to show pretext: (1) through comparative evidence it can be demonstrated that plaintiff was treated differently due to race. *Pree v. Stone & Webster Engineering Corp.*, 607 US F.Supp 945 (9th Cir. 1985); (2) to establish that the adverse action is part of a general pattern of racial discrimination. *Sylvester v. Callon Energy Services, Inc.*, 781 US F.2d 520 (5th Cir. 1986); (3) the employer's action is contrary to a stated company policy. *Turgeon v. Howard University*, 571 US F.Supp 679 (D.C. Cir. 1983); (4) demonstrate that the employer's explanation is implausible or arbitrary. *Furnco Const. Corp. v. Waters*, 438, 567, 57 L Ed.2d 957, 98 S. Ct 2943 (U.S. 1978). (5) show that the stated reason is presented for the first time at the trial. *Id. Sylvester v. Gallon*; and, (6) if a plaintiff is replaced by a nonminority employee or if defendant's explanation of the adverse action is not credible, the court can infer motive. *Texas Dept. of Community Affairs v. Burdine*, 450, 248, 67 L Ed.2d 207, 101 S Ct 1089 (U. S. 1981).

Petitioner carried his burden of meeting all pertinent

requirements with documented evidence that included both reliable and creditable information that was extracted from the General Accounting Office's (GAO), September 1995 report: Equal Employment Opportunity-Women and Minority Representation at Interior, Agriculture, Navy, and [State].

The GAO, acting as the Congressional watchdog to periodically evaluate if federal agencies are in compliance with Congressional mandates for ensuring equal employment opportunities in federal government are afforded to all citizens regardless of race, color, gender, religion and veteran status, was specifically mandated to provide to the ranking minority member, Committee on Government Affairs, U.S. Senate, critical information with detailed statistical data charts. Clearly the D.C. Circuits affirmation of the trial court's rejection of defining and relevant information from a Congressionally tasked and creditable investigatory body, coupled with categorizing such factual information and comparative statistical data as being insignificant, was fundamentally a prejudicial and harmful discretionary error. Civil Rights Act of 1964, 701 et seq., as amended 42 U.C.A. 2000e et seq. Differential Pass-Fail Rates in Employment Testing: Statistical Proof under Title VII. *See also Davis v. Califano*, 613 F.2d 957, 198 (D.C. Cir. 1979); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); and, GAO's Report to the Congress, June 1989: State Department-Minorities and Women Are Underrepresented in the Foreign Service. (Appendixes A and B)

Further, Middleton demonstrated to the district court that respondent had refused to adopt a less-discriminatory alternative employment hiring practice that was well corroborated by cited GAO report. As a consequence, a refusal of this nature by an employer "automatically" establishes an unlawful employment practice. *Id.* Subsection 105(a) of the Civil Rights Act of 1991.

By Respondent's own admission, it was established that the selection and evaluation process that was in place when Middleton applied for a position in 1992, had an adverse impact on women and minorities, or Title VII protected groups, and that the defendant defiantly indicated that there was no compelling reason to adopt the EEOC's Uniform Guidelines on Employee Selection Procedures, pursuant to 29 C.F.R. 1607.1 at 1607.3(B) 1991.[3] Accordingly, a defendant under Subsection 105(a) does not have any further opportunity to rebut; thus, plaintiff must prevail in establishing a prima facie case. *Id. McDonald Douglas Corp.*, 411 at 792, 801 (U.S. 1973).

Unquestionably, Middleton was denied due process of law when the trial court abused its discretionary authority by refusing to allow time to file a motion in response to Respondent's introduction of three additional exhibits at start of April 2, 1998 hearing on respondent's renewed motion for summary judgment hearing, in which Middleton's attorney withdrew from the case. A response to proffered "new" evidence was critical to claim, and Middleton presented bona fide explanation for wanting to rebut evidence before trial court rendered a final summary judgment decision. Moreover, deferment of ruling would not have prejudiced employer inasmuch as prompt notification to the trial judge was transmitted by facsimile on April 15th upon receiving by

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[3]The Uniform Guidelines require federal agencies to analyze whether personnel testing and selection procedures for hiring, job assignments, promotions, training, and separations adversely affect Title VII-Equal Employment Opportunity Groups. The Uniform Guidelines were adopted by the Civil Service Commission (now Office of Personnel Management), the Department of Justice, the Department of Labor, the Department of the Treasury, and the Equal Employment Opportunity Commission in 1978.

mail on April 11th, Respondent's notice of filing with accompanying additional three exhibits. An allowance of time for reciprocal response would have entailed minimal delay. *Rivera-Flores v. Puerto Rico Telephone Co.*, 64 F.3d 742, (1st Cir.1995); rehearing denied. *Buckingham v. U. S.*, 998 F.2d 735 (9th Cir. 1993); *People v. White*, 35 .2d 61, 94 P.2d 617, 621 (9th Cir. 1939).

The Eighth Circuit has cautioned that "summary judgment should seldom be used in employment discrimination cases." *Crawford v. Runyon,* 37 F.3d 1338, 1341 (8th Cir. 1994). Recognizing, prudently, that "summary judgment is a drastic remedy and must be exercised with extreme care to prevent taking genuine issues away from juries." *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1238 (8th Cir. 1990). And that "Summary judgment is appropriate [only] in those rare instances where there is no dispute of fact and where there exists only one conclusion." *Webb v. St. Louis Post-Dispatch*, 51 F.3d 147, 148 (8th Cir. 1995) (quoting *Johnson*, 931 F.2d 1244).

The D.C. Circuit's affirmance decision indicates that the circuits are still divided on the standard of liability which the plaintiff needs to meet, whether the burden shifts once the plaintiff has made a prima facie case, and if the burden shifts, when it shifts; understanding, of course, that the burden of proof and persuasion remains at all times with the plaintiff who [must] establish that the defendant's stated reason is pretextual. By not allowing Middleton an opportunity to show pretext, and argue the merits of his supplemental complaint, the trial court overreached its judicial discretion in accepting Respondent's credibility over that of Petitioner on motion for summary judgment, instead of reserving such a question of credibility to a trier of fact. *Munz v. Michael*, 28 F.3d 795, 798 (8th Cir. 1994). (Appendix B)

CONCLUSION

A favorable decision of this Court, will aid immeasurably in sending a strong and consistent message to this Nation's employers, public and private alike, that there is a collective and unwavering commitment among the executive, legislative and judicial branches of this Nation's federal government to ensure that the intent, purpose and spirit of [all] the laws protecting and preserving the rights and benefits and privileges of our veterans, disabled veterans and other qualified individuals with disabilities, [shall] be implemented and enforced to the fullest extent possible.

For the foregoing statement of facts and reasons given, Petitioner prays that this petition for certiorari be granted and the decisions of the lower courts be reversed to eliminate more conflicting rulings that continue to occur throughout the entire United States Courts of Appeals and district courts systems.

Respectfully Submitted,

Charles Middleton, Sr.

Charles Middleton, Sr.
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Date: July 15, 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 98-5345

September Term, 1998
96cv01963

Charles Middleton, Sr., Major USAF, retired
Appellant

v.

Madeline K. Albright, Secretary,
U. S. Department of State, et al.,
Appellees

BEFORE: Silberman, Henderson, and Tatel,
Circuit Judges

ORDER

Upon consideration of the motions for leave to file, the responses thereto, and the replies; the lodged motion to extend time, the response thereto, and the reply; and the lodged motion to dismiss or for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motions for leave to file and the motion to extend time be granted. The Clerk is directed to file the, lodged pleadings. It is

FURTHER ORDERED that the motion to dismiss

be denied. The record reveals that appellant's notice of appeal was received within the applicable time limit. See Moore's Federal Practice, § 303.31(2)(a)(iv) (Matthew Bender 3d ed.). It is

FURTHER ORDERED that the motion for summary affirmance be granted substantially for the reasons stated by the district court in its order filed April 27, 1998. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied , 449 U.S. 994 (1980). Considering all the evidence in its full context, the district court properly determined that appellant did not provide sufficient evidence that the real reason for appellee's failure to hire him was racial discrimination. See Aka v. Washington Hosp. Ctr., No. 96-7089,1998 WL 698396 (D.C. Cir. Oct. 9,1998). Nor did appellant provide sufficient statistical evidence to establish a claim of disparate impact. See Metrocare v. WMATA, 679 F.2d 922, 930 (D.C. Cir. 1982). As to appellant's challenge to the district court's consideration of certain exhibits provided o the day of the summary judgment hearing and discussed at the hearing, counsel did not object to their introduction. See Passaic Daily News v. NLRB,736 F.2d 1543, 1554 n.15 (D.C. Cir. 1984).

APPENDIX A

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 98-5345 September Term, 1998

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Civil Action No. 96-1963 (JR)

CHARLES MIDDLETON, SR.
Plaintiff,

v.

WARREN H. CHRISTOPHER,
Secretary, DEPARTMENT OF STATE,
Defendant.

ORDER

For reasons stated in open court on October 22, 1997 it is this 23rd day of October 1997,

ORDERED that defendant's motion to dismiss plaintiff's disability claim [#13] is granted. It is

FURTHER ORDERED that the trial date set by this Court's order of October 1, 1997 [#21] is continued. And it is

FURTHER ORDERED that the dates for pretrial conference and trial will be set after the Court's consideration of defendant's motion for summary judgment.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Civil Action No. 96-1963 (JR)

CHARLES MIDDLETON, SR.
Plaintiff,

v.

WARREN H. CHRISTOPHER,
Secretary, DEPARTMENT OF STATE,
Defendant.

ORDER

Upon consideration of defendants, motion for summary judgment, the opposition thereto, a review of the entire record, and for the reasons stated in the accompanying memorandum, it is this 24th day of April, 1998,

ORDERED that defendants, motion for summary judgment [# 25] is Granted.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Civil Action No. 96-1963 (JR)

CHARLES MIDDLETON, SR.
Plaintiff,

v.

WARREN H. CHRISTOPHER,
Secretary, DEPARTMENT OF STATE,
Defendant.

ORDER

Plaintiff alleges that he was unsuccessful in his application for employment as a Foreign Service officer at the Department of State because of age, race and disability discrimination. The disability discrimination claim was dismissed by previous order of this court. Defendant now moves for summary judgment on plaintiff's remaining claims. For the reasons stated herein, that motion will be granted.

Background

Plaintiff, an African American male, applied on March 31, 1992 for a mid-level Foreign Service officer

position with the State Department. He was then 50 years old. He applied through the Department's Mid-Level Affirmative Action Program ("MLAAP"), which was designed to recruit minorities to FSO positions by allowing their application packets to be reviewed by a panel and then, if approved, sent directly to the oral examination that is normally part of the application process. The staffing specialist who reviewed plaintiff's file determined that relevant experience qualified him only for one of the three "conal areas" for which he applied. He was approved for the "administrative cone" specialty, but not for the political and economic ones. The specialist also requested that plaintiff supplement his application packet with a college transcript and writing samples, which he did. The packet was then passed to the three member review panel. The review panel agreed with the specialist that plaintiff was only qualified for the administrative cone, and they rejected his application for the administrative cone. The panel issued a written decision reciting concerns about plaintiff's writing ability. The stated reason for the concerns was the number of typographical, spelling and grammatical errors in plaintiff's application packet.

Plaintiff filed a timely EEO claim within the Department, asserting that the panel's concerns about his writing ability were a pretext for discrimination against him, based on age and race. The agency investigated and found against him, at which point he filed this suit in the Northern District, of Illinois, adding a claim of disability discrimination for the first time. The case was transferred here, and I dismissed plaintiff's disability claim.

In the motion currently before me, the Department argues that plaintiff cannot make out a *prima facie* case of disparate discrimination, because he cannot satisfy the

second and fourth elements of the McDonnell Douglas *prima facie* case, namely, that he was otherwise qualified for the job, and that the position was offered to someone not a member of his protected class. To show that plaintiff was not "otherwise qualified," defendants, recite the number of errors in plaintiff's application of errors in plaintiff's application packet and point out that writing ability is a published FSO employment criterion, see Opp. to Mot. for Summ. Judg., Exh. 1, at 4. To show that the job was not offered to an unprotected person, the Department asserts that of the five MLAAP applicants hired in 1992, three were African American, and two were Hispanic;[1] moreover, one was 56 years old, two were 49 years old, one was 42 years old, and one was under, 40.[2]

The Department argues further that even if plaintiff could make out his *prima facie* case by pointing to the two non-African American hires, the totality of the evidence, strongly negates the proposition that race was a factor in the decision. Therefore, the Department argues, summary judgment is appropriate unless plaintiff comes forward with enough evidence to allow a reasonable jury to conclude that the Department's proffered reason for the decision not to hire him was in fact a pretext for racial discrimination.

Plaintiff's opposition to this motion set forth an admixture of disparate impact and disparate treatment theories. He argues that the state Department has engaged in a policy "containment" intended to ensure that the overall

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[1]The Department first stated that one of the five was white but corrected that statement in its reply.

[2]Based on this information, plaintiff agreed at oral argument that his age discrimination claim is not viable.

number of minority employees remains constant, thus negating the intended affirmative action effects of MLAAP. He argues that his writing is at least equal to that of one of the accepted applicants. He alleges that the State Department in 1992 began to allow non minorities to apply for mid-level FSO positions through the MLAAP program. And he argues that a General Accounting Office study of State Department employment and hiring practices between 1984 and 1992 shows that minorities were underrepresented and that minority hiring was equal only to the minority separation rate.

Analysis

Disparate impact

If plaintiff's claim is of disparate impact, his *prima facie* case must: 1) identify a specific employment practice; and 2) show that the practice has caused a statistical disparity adversely affecting the protected class of which he is a member.[3] Wards Cove Packing Co., Inc. v. Atonio, 490 U. S.9. 642, 656-57 (1989).[4]

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[3]An individual plaintiff does not have standing to bring a disparate impact case unless he can show that "he was not hired or promoted as the direct result of [the] discriminatory hiring practice...." Melendez v. Illinois Bell Telephone Co., 79 F.3d 661, 668 (7th Cir. 1996). See also, Lujan v. Defenders of Wildlife, 504 U. S. 555, 560-61 (1992).

[4]The Civil Rights Act of 1991 was enacted in part to reverse the Wards Cove case, but the Act did not affect Wards Cove's outline of a *prima facie* case of disparate impact. See District Council 37, AFSCME, AFL-CIO v.

Plaintiff alleges that the Department attempted to limit the number of minorities in its employ through "containment" and that the Department implemented that policy two specific acts: a) deciding to allow non-minorities to participate in MLAAP in 1992; and b) structuring MLAAP to maintain the minority hiring rate at a level equal to the minority separation rate. It is a close question whether the allegations satisfy the first element of the Wards Cove *prima facie* case, but it is not necessary to, resolve the question because plaintiff has clearly failed to support the second element, that of statistical disparity.

To establish the required link between a challenged employment practice and a statistical disparity adversely affecting a protected class, a claimant must present statistical evidence regarding the minority applicant pool and the number of qualified applicants from his protected class. See Whitacre v. Davey, 890 F-2d 1169, 1172 (D. C. Cir. 1999), cert. denied, 497 U. S. 1038 (1990) ; Anderson v. Group Hospitalization, Inc., 820 F-2d 465, 469 (D. C. Cir. 1987) ; Metrocare v. Washington Metropolitan Area Transit Authority, 679 F.2d 922, 930 (D. C. Cir. 1982). As those cases demonstrate, without statistics on the minority applicant pool – how many applied, how many were qualified, and how many were hired – it is impossible to determine whether the employment practice caused the disparate results of the hiring process. The GAO study cited by plaintiff contains no such information: it merely recites the number of minorities who were employed, hired, separated and promoted at the Department each year. See Opp. to Mot - for Summ. Judg., Exh. 2 (appendices to exhibit show number of people in each racial and gender

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New York City Dept. of Parks and Recreation, 113 F.3d 347, 354 n.4 (2nd Cir. 1997).

category who were employed, hired, separated and promoted during fiscal years 1984 and 1992).

Disparate treatment

If, on the other hand, plaintiff's claim is of disparate treatment, his *prima facie* case must establish that he is a member of a protected class, that he applied for an available position for which he was otherwise, qualified, that he was not offered the position, and that the position was offered to a non of his protected class. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). If plaintiff makes out this *prima facie* case, then it is up to the Department to present evidence of a non-discriminatory reason for the decision not to hire plaintiff. If the Department comes forward with a credible non-discriminatory reason for the decision, plaintiff may assert that the proffered reason is in fact a pretext for discrimination.

The Department's first position is that plaintiff cannot make two of the four showings necessary to his *prima facie* case – that he was otherwise qualified for the FSO position for which he applied and that the position was offered to a non-member of his protected class. On the "otherwise qualified" element, I cannot find as a matter of law that plaintiff has failed to meet his burden. The alleged deficiency in plaintiff's writing skills is a matter of subjective judgment, the sincerity of which may be determined only by a jury. As for membership in the protected class, it is undisputed that two of the five MLAAP positions were filled by Hispanics, who were not members of plaintiff's protected class.

The Department next argues that, even if plaintiff

has made out his *prima facie* case, summary judgment is appropriate because plaintiff has failed to rebut the Department's stated non-discriminatory reason for failing to hire him. The Department urges that no reasonable jury could find that discriminatory animus was a motivating factor in plaintiff's rejection where: a) MLAAP was intended to help several identifiable minority groups, including African Americans and Hispanics; b) all five of those hired were in fact African American or Hispanics; c) the majority of those hired were indeed from plaintiff's protected class; and d) plaintiff admits that his application packet contained numerous typographical, spelling and grammatical errors.

Plaintiff does not specifically answer this argument, and the only evidence he offers to "discredit the defendant's proffered nondiscriminatory reasons," Barbour v. Merrill, 48 F.2d 1270, 12'77 (D. C. Cir. 1995), cert. dismissed, 516 U.S. 1155 (1996), is the GAO study that I have found insufficient to support a *prima facie* case of disparate impact. It is true that "proper statistics" can give rise to an inference of discriminatory intent, Metrocare v. Washington Metropolitan Area Transit Authority, 679 F.2d at 930 n.12, but "proper statistics" must address the qualifications of the minority applicant pool "[w]hether the charge be disparate racial impact or disparate racial treatment." Id., 679 F.2d at 930. Thus, plaintiff's statistical evidence in this case is insufficient as a matter of law, and plaintiff has failed to present any evidence that would allow a jury to reasonably conclude that the Department's proffered reason for not hiring him was in fact a pretext for racial discrimination, cf. Kolstad v. American Dental Association,108 F.3d 1431, 1436 (D. C. Cir. 1997) (under Title VII, judgment as a matter of law barred where plaintiff has presented "sufficient evidence for the jury to conclude," that the

employer's proffered nondiscriminatory reasons were a pretext for discrimination), regardless of the outcome of the Circuit's *en banc* review of Aka v. Washington Hospital Center, 116 F.3d 876, (D. C. Cir. 1997), vacated and reh'g *en banc* granted, 124 F.3d 1302.

An appropriate order accompanies this memorandum.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 98-5345 September Term, 1998
96cv01963

Charles Middleton, Sr., Major USAF, retired
Appellant

v.

Madeline K. Albright, Secretary,
U. S. Department of State, et al.,
Appellees

BEFORE: Silberman, Henderson, and Tatel,
Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed December 14, 1998, it is

ORDERED that petition be denied

Per Curiam

APPENDIX D

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington D.C., 20507

Agency No.93-29
Request No.05950405
Appeal No.01944023

CHARLES MIDDLETON, SR.
Appellant

v.

WARREN H. CHRISTOPHER,Secretary,
DEPARTMENT OF STATE,
Agency

DENIAL OF REQUEST TO RECONSIDER

On March 6, 1995, Charles Middleton, Sr. (hereinafter referred to as appellant) initiated a request to the Equal Employment Opportunity Commission (EEOC or Commission) to reconsider the decision in Charles Middleton, Sr. v. Warren M. Christopher Secretary. Department of State, EEOC Appeal No. 01944023 (February 2, 1995). EEOC regulations provide that the Commission may, in it discretion, reconsider any previous decision when the part requesting reconsideration submits written argument or evidence which tends to establish one or more of the following criteria: 2 C. F. R. S1614.407(c) (1) (new and material evidence is available that was not readily available when the previous decision was issued) 29 C. F. R.§1614.407(c) (2) (the previous decision involved a erroneous interpretation of law, regulation, or material fact,

or a misapplication of established policy); or 29 C. F. R §1614.407(c)(3) (the decision is of such exceptional nature as to have substantial precedential implications).

After a review of the appellant's request to reconsider, that previous decision, and the entire record, the Commission finds that the appellant's request fails to meet the criteria of 29 C. F. R §1614.407(c), and it is the decision of the Commission to deny the appellant's request.[1] The decision in EEOC Appeal No. 0194402 (February 2, 1995) remains the Commission's final 2 #05950473 decision. There is no further right of administrative appeal on a decision of the commission on this Request to Reconsider.

RIGHT TO FILE A CIVIL ACTION (P0993)

This decision of the commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court. It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date

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[1]Appellant claims that the final agency decision was invalidly issued because he never received a hearing before a administrative judge. The Commission's regulatory scheme, however provides for hearings on EEO complaints not properly dismissed by the agency pursuant to 29 C.F.R. S1614.107. Pletten v. Army, EEO Request No. 05940412 (February 24, 1995). A federal agency is in fact obligated at this stage in the proceedings to dismiss complaint when it meets one of the criteria in this regulation including mootness. 29 C.F.R. S1614.107(e) ("the agency shall dismiss a complaint or portion of a complaint ... that is moot.").

Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision. You should be aware, however, that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision or to consult an attorney concerning the applicable time period in the jurisdiction in which your action would be filed. If you file a civil action, **YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE**. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

RIGHT TO REQUEST COUNSEL (Z1092)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as an amended, 29 U.S.C. SS791, 794(c). **The grant or denial of the request is within the sole discretion of the Court**. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").